UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 19 Cr. 374 (JMF)

MICHAEL AVENATTI,

Defendant.

Trial

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New York, N.Y.
February 3, 2022
9:00 a.m.

Before:

HON. JESSE M. FURMAN,

District Judge
-and a Jury-

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: MATTHEW D. PODOLSKY
ROBERT B. SOBELMAN
ANDREW A. ROHRBACH
Assistant United States Attorneys

MICHAEL AVENATTI, Defendant *Pro Se*

DAVID E. PATTON
Federal Defenders of New York, Inc.
Attorney for Defendant
BY: ROBERT M. BAUM
ANDREW J. DALACK
TAMARA L. GIWA
Standby Assistant Federal Defenders

Also Present: Special Agent DeLeassa Penland
U.S. Attorney's Office
Christopher de Grandpre, Paralegal Specialist
Juliet Vicari, Paralegal

(Trial resumed; jury not present)

THE COURT: You may be seated.

Good morning. Welcome back, everyone.

MR. AVENATTI: Good morning.

THE COURT: The government is here. Mr. Avenatti is here. Standby counsel is here.

As I think you know, we have received a note. I will read it into the record. I already had a copy given to both sides. The note reads as follows:

"We are unable to come to a consensus on Count One. What are our next steps?"

It is dated today, February 3, at 10:37 a.m., signed by one of the jurors who is apparently the foreperson.

All right. I did provide, through my deputy, a proposed answer to the question, a modified *Allen* charge, so to speak. I think you have each received a copy of that. I did bracket the middle paragraph in the instruction because I am not persuaded that it should be included at this juncture. The jury has only been deliberating for just over four hours. They have not sent any notes requesting any evidence or testimony. Part of me thinks we should simply tell them, keep at it, and leave it at that. But I am also open to including it and wanted to include it for your consideration.

So what is the government's view?

MR. SOBELMAN: We are comfortable proceeding in either

manner, either the Court giving a limited direction or the longer instruction. We think both would be appropriate.

THE COURT: Mr. Avenatti.

MR. AVENATTI: Your Honor, I object to the inclusion of the bracketed language and request that the *Allen* charge include lines 2 through 8 and 18 through 20.

THE COURT: And just that, I take it?

MR. AVENATTI: Yes, sir.

Your Honor, one moment.

I am going to modify that position and request that the Court give the entirety of the charge, lines 2 through 20, including the bracketed language.

THE COURT: OK. Interesting.

All right. Anyone have a view, I could simply send a written response to the jury and provide this in writing to them and not bring them up, or I could bring them up and we could orally instruct them.

MR. AVENATTI: Your Honor, you're asking what our position is on bringing the jurors up as opposed to just giving them this in writing, am I correct?

THE COURT: Yes. I would be inclined to bring them up and give it to them orally.

MR. AVENATTI: The defense requests that they be brought up, your Honor.

THE COURT: Government.

MR. SOBELMAN: That's fine with the government.

THE COURT: So given the defense request, I will include the middle paragraph as well. I take it no objections to the instruction as I have drafted it, including that middle paragraph?

MR. SOBELMAN: That's correct, your Honor.

THE COURT: All right. Very good. We will get the jury, and I will read the instruction to them and send them back.

(Jury present; time noted: 11:17 a.m.)

THE COURT: You may be seated.

Good morning welcome back. Hope you had a pleasant evening last night.

I received your note, which reads as follows:

"We are unable to come to a consensus on Count One. What are our next steps?"

As I instructed you yesterday, in order to return a verdict in this case, each juror must agree as to each count. In other words, your verdict must be unanimous. You should, therefore, consider all the evidence in the case and fully deliberate upon that evidence in a conscientious manner. Remember to follow all of my instructions, including my instruction that, at all times, the government has the burden of proof beyond a reasonable doubt. Also remember your oath, when you were sworn in as jurors, that you should try this case

and attempt to renter a true verdict according to the evidence and the law.

Although each juror must decide the case for him or herself, this should be done after an impartial consideration of all the evidence with your fellow jurors. In the course of your deliberations as a juror, you must examine everybody's point of view. You should not hesitate to reexamine your own views and to change your opinion if you are convinced that it is erroneous. There is no reason to believe that if this case were to be tried again that another jury would be any more intelligent, more impartial or more competent to decide than you are. At the same time, no juror should surrender his or her honest conviction as to the weight or the effect of the evidence to his fellow or her fellow jurors or for the purpose of returning a verdict; it is your right to fail to agree if your honest conviction requires it.

I would like to suggest at this time that you return to the jury room and reflect upon what I've said and resume your deliberations for such time as you, in your judgment, feel to be reasonable.

With that, I will excuse you to continue your deliberations.

(Jury resumes deliberations)

THE COURT: You may be seated.

All right. I will mark the note as Court Exhibit 1.

My plan and practice is to docket all jury notes and the verdict form, if or when we get one, at the conclusion of the case.

Anything else to discuss at this time?

MR. SOBELMAN: Nothing from the government, your Honor.

THE COURT: Mr. Avenatti.

MR. AVENATTI: Nothing from the defense. Thank you, your Honor.

THE COURT: So if you're not in the courtroom, and therefore accessible, make sure we know where you are and don't go far, and I will see you when I see you.

Thank you very much.

(Recess pending verdict)

THE COURT: You may be seated.

As I gather you know, we have received is a second note. It reads as follows:

"1. We are requesting the full transcript for the full testimony of Stormy Daniels (Stephanie Clifford) that began on Thursday, Jan. 27 arrow Friday, January 28.

"2. Please define 'good faith' as mentioned in the judge's instructions."

So with respect to item 1, what I will do is send them a copy of the transcript. What I would like you to do is agree on what that means -- that is to say, it should not include any

sustained objections, since if I sustained an objection or struck testimony, then that is not in evidence and they shouldn't consider it. So it should redact all of those portions of the transcript. I would hope and assume that you could agree on what that means, and therefore figure this out sooner rather than later. But if there's disagreements, then I would resolve them.

In the meantime, though -- first, any comments, thoughts on that? And given the social distancing rules in place, I propose that when we figure out what we are sending them, that we make 12 copies and send it to them so each can have their own copy.

Mr. Podolsky.

MR. SOBELMAN: Your Honor, I think we have an agreement in principle with the defense on how to go about doing this, and we actually have already made some redactions, some proposed redactions in preparation for this potentiality. So we are hopeful we can have something to the Court soon. We are working as quickly as we can.

THE COURT: Great. My deputy also reminds me or advises me that we can include it on the folder that they can access it in the jury room electronically. So that's another option. I guess we can do that along with providing printed copies so that they can do whatever they want with it, I suppose.

Mr. Avenatti.

MR. AVENATTI: Yes, your Honor. I object to the entirety of the transcript being placed before the jurors in the jury deliberation room. I believe the testimony should be read to the jurors. The reason for my objection is multifaceted. Number one, not all of the jurors are able to read the transcript at the same time in the jury deliberation room. They may have other people within the jury deliberation room read the transcript aloud. And I think that the proper way to handle a request for testimony is to have it read back in open court for the benefit of the jury; and therefore, for that reason, I object.

THE COURT: Can you cite any authority for the proposition that that's the way to handle it? Because in my 18 years as a judge or prosecutor I have never seen it done that way.

MR. AVENATTI: I have been involved in a number of trials -- strike that.

I have never seen it done where the transcript is actually given to the jury.

THE COURT: That's not my question. Because I understand that it can be read back and that's one form of doing it. But I think the standard practice, certainly my standard practice, is to send the transcript. I will also note that they actually asked for the transcript. They don't ask

for a readback, they ask for a transcript. And number three, the premise of your objection is not accurate. If we give them 12 copies and provide it to them electronically, then they can all review it simultaneously. It just seems like an enormous waste of everybody's time to bring them up here and read what amounts to a full day's testimony.

So if you can cite authority that it's error to do it this way, then I am open to that.

MR. AVENATTI: Your Honor, I just saw the note four minutes ago. So I haven't had a chance to research or do any research for authorities. I understand the Court is asking for authority, but I literally just got the note.

THE COURT: While you agree on the redactions, you can see if you can find authority, and if you persuade me, then we will read it. Otherwise, my plan is to send the transcript, honor the jury's explicit request and send the full transcript in the manners that I have described.

As for number two, because if we can figure out how to handle that, one option is to bring them up, tell them that we are working on their first request while we answer the second one. Any thoughts on how to handle that?

One option is for me to simply read the paragraph from the jury instructions that pertains to good faith.

MR. AVENATTI: Your Honor, the defense requests that the answer be exactly as what you have just proposed -- namely,

the answer to question number two, that the Court merely reread only the good faith instruction.

THE COURT: Government.

MR. PODOLSKY: Well, two thoughts.

One, I think that if we are going to refer them back to the instructions, we should include the instruction on intent to defraud because that is what the good faith defense is, it is an explanation of what the government has to prove as far as intent to defraud.

I think, and we don't want to slow things down, but it would be helpful if we could take a few minutes to think if there is another instruction to give. The reason I say that is this jury seems very attentive. They each have their own copy of the charge, and I think they are looking for some guidance as to the term "good faith." And I just don't want -- I don't think it's in anyone's interest to leave them with sort of no additional guidance if there is some guidance to provide.

I have quickly been trying to find some Second Circuit law that might provide a more succinct definition of what the phrase "good faith" might mean, and candidly we may not find something that will help us, but I thought it might be worth a few extra minutes to see if we can provide the jury with some additional guidance on this question.

THE COURT: I am certainly open to other suggestions. I gather that -- well, you may want to *United States v. Alkins*,

925 F.2d 541, at 550, a Second Circuit decision from 1991.

MR. PODOLSKY: Our realtime is not working for some reason, if you wouldn't mind repeating the citation.

THE COURT: 925 F.2d at 541, at 550.

The Second Circuit stated, "The instruction given by the district court here adequately stated the good faith defense. The court stated the meaning of good faith, when it instructed the jury, that an honest belief in the truth of the representations made by defendant is a good defense, however inaccurate the statement may turn out to be." So no further elaboration was necessary.

MR. PODOLSKY: That was the case I was looking at. That is a simple statement, that we could direct them back to the jury instructions and perhaps add that sentence that has been approved by the Second Circuit, would be one option.

THE COURT: Why don't you ponder and discuss it amongst yourselves and in the meantime I will consider this in conjunction with what I already told them, figure out if I think there is a way to handle this.

MR. PODOLSKY: I am just going to stand up and see if I can consult and see if I can get some additional comments here.

(Pause)

THE COURT: Counsel, I am printing out a copy of a proposed instruction to give us something to work off of. I

will give each side a copy to review and then we will discuss.

THE COURT: Counsel, can we discuss my proposal?

Government.

MR. PODOLSKY: We are OK with this instruction, your Honor.

THE COURT: Mr. Avenatti.

MR. AVENATTI: Your Honor, I object to the instruction, and I have an alternative instruction to provide.

THE COURT: Can you first tell me the basis of your objection?

MR. AVENATTI: I don't believe that this definition of good faith is appropriate in this case under the facts and evidence, your Honor.

I am proposing requesting that the Court reread the good faith instruction previously provided to the jury in the charge and add the following instruction: In this case, good faith means Mr. Avenatti believed he was owed money even if he wasn't owed any money.

THE COURT: That is not accurate. If you were owed money, that doesn't constitute good faith. You had to have a good faith belief that you were entitled to take the money. So that request is denied.

The proposal that I have made, Mr. Avenatti, is pretty much consistent with what you had initially proposed -- namely, that I reread the instructions that I gave them yesterday. The

only real change to it is adding the sentence, good faith means an honest belief in the truth of the representations made by a defendant -- I would propose that we say "the defendant" -- however inaccurate the statement may turn out to be, which is a direct quote from the *Alkins* decision that the Second Circuit approved that precise language. So I don't quite understand.

MR. AVENATTI: Your Honor, in this case, it's not about the representations that were made. This case is about whether I had a good faith belief that I was entitled to the money. *Alkins* was a case about representations. And so by inserting or by defining good faith in the way your Honor is proposing, you are transforming this case into one about representations as opposed to my actual belief. That is the issue, your Honor. The issue is not whether I believed the representations that were made were accurate. The issue is whether I actually had a good faith belief that I was owed the money, and entitled to the money.

THE COURT: Entitled to take the money, Mr. Avenatti. That's the key that your proposal is obscuring. Having said that -- well, Mr. Podolsky.

MR. PODOLSKY: I don't agree. This case is about representations and the question of whether the defendant had an intent to defraud when he made them. The instruction that your Honor has proposed is precisely accurate. In fact, it's a quote from the circuit law. Then the instruction explains,

thus, if the defendant in good faith believed that he was entitled to take the money or property from the victim, even if that belief was mistaken, then you must find him not guilty even if others were injured by the defendant's conduct. This is an accurate statement of the law, and it also applies it to the facts in this case in precisely the way the defendant would like, except for the change that your Honor pointed out, which is the way the defendant would want it is not quite an accurate statement.

MR. AVENATTI: Your Honor, I am struggling to understand why we are going to provide a further instruction to the jury beyond what we have already instructed the jury on. The government did not seek any further instruction relating to good faith. Any objection to the good faith instruction by the government, the initial good faith instruction has been waived. And I object to any further instruction relating to good faith other than a reread of what was already provided to the jury.

THE COURT: Mr. Avenatti, that's different from what you literally said to me 30 seconds ago. So I don't understand. And there is no waiver issue. We are responding to a jury note. So we are dealing with a new situation.

Having said that, if your proposal is that I simply reread the portion of the instruction, which would essentially be what I have given you, but minus the new section between lines 8 and 10, I am certainly open to that. It doesn't really

give the jury much to work with because they already have that in the jury charge that they heard yesterday and a printed copy of which they have in the jury room.

MR. AVENATTI: That is my request in the first instance, your Honor, that you reread what was previously provided to them as it relates to good faith and nothing more.

MR. PODOLSKY: Your Honor, they specifically asked for help. They heard you read the instructions. They read the instructions. The jury has asked for help. I have seen this in other cases. The jury is clearly trying to deliberate and asking for help. Giving them an accurate statement of the law to help them deliberate is the purpose of a jury note, and we should be willing to do that so that they can continue their deliberations. And to be clear, my point is simply rereading the same instruction that was given is not helpful to the jury and doesn't respond to their note.

THE COURT: All right. I think my inclination is to do the following, which is take out the new proposed sentence, notwithstanding my agreement with Mr. Podolsky that it doesn't really give the jury much beyond what they already have, but to say at the end that if that does not adequately answer your question, you can send us a new question. And if they tell us it doesn't do it, then we will decide what to do then.

MR. PODOLSKY: My hesitation on that is the following, your Honor. I think if they feel that it doesn't quite answer

their question and they ask for a further definition, we are not going to have a great deal more. And to my mind the simplest way to approach this is simply to provide the instruction that you have given here, which will give them something to work, again, accurately states the law, again, applies it, in the last sentence of the second paragraph, to the facts of this case in precisely the way that the defendant has advocated, and that way we frankly don't risk another note and a series of sort of frustrations. We are obviously limited in the way we do jury instructions by the fact that we have to accurately relay the law to them, but they also are laypeople who are trying to understand how to apply the law to the facts in this case. So I think it would be useful to them to simply provide additional content when they have asked for it.

THE COURT: Here is the concern I have, Mr. Podolsky, and why I think maybe buying time, even if that's all we do, is the right thing. I think Mr. Avenatti's point is well taken, which is -- and apropos to *Rossomando*, the case he gave me earlier during the trial -- it is not accurate to say that the jury can convict Mr. Avenatti if they find that he lied in his e-mails to Ms. Daniels, and I am not sure there is any real dispute that he did; they would have to find that he lacked a good faith belief that he could take the money. I think *Rossomando* does say that the jury could not convict based solely on a finding that the defendant lied and as a result

kept the money or property that he obtained. It has to be lied with the intent to defraud the victim of the money or property.

So I think my concern, and again, I think Mr. Avenatti's point is well taken, is that the definition from *Alkins* -- and I haven't read *Alkins*, I have just read the portion that has that definition -- might not do the trick and might inject some or the danger that the jury here finds that he lied in his e-mails and WhatsApp messages to Ms. Daniels and convict him on that basis, and that wouldn't actually be proper. So I think buying time makes sense because it would give both sides an opportunity to read *Alkins*, myself as well, read other applicable case law, and see if there is a definition of good faith that can be crafted that fits the facts of this case better and addresses the *Rossomando* concern, and would urge both sides to think about that on the theory that we may well hear back from the jury that they want further guidance. But that is sort of where I come down and why I think giving them a nonanswer answer may be the right approach in the first instance.

MR. PODOLSKY: Very well, your Honor.

THE COURT: Mr. Avenatti, I assume you don't object to that.

MR. AVENATTI: I do not, your Honor. I actually was able to find some authority on this issue of the transcripts.

THE COURT: OK. Why don't you give me that.

Well, let me make sure we are in agreement on the good faith.

So what I will read to them is just what I have given you there, minus the sentence that says good faith, in quotes, from *Alkins*, and just goes from "because an essential element of wire fraud is the intent to defraud, it follows that good faith on the part of a defendant is complete defense to the charge of wire fraud. Thus, if the defendant in good faith believed," and so on from there.

All right. Everybody is in agreement with that answer?

MR. AVENATTI: The defense is, your Honor. I wasn't clear or it was not clear to me as to whether the Court was going to tell the jury if they needed further information to inform the Court. If so, I would object to that because we have already instructed the jury that they have the ability to send notes, and they have already demonstrated their familiarity with the process, and they are not shy about doing so. So I request that simply the instruction be read and nothing more as it relates to responding to question two.

THE COURT: I am going to add at the end, If that does not answer your question adequately, you can of course send us another request. I think there is no harm in reminding the jury of that and making clear that we are trying, but may not have gotten it.

Yes, Mr. Podolsky.

MR. PODOLSKY: With apologies, I do have an additional request.

I think, and we can simply use the language from the charge, but I think in the first paragraph we should explain what intent to defraud means. And the reason I emphasize that is I think as given this is somewhat unbalanced, in the sense that it's important to realize that good faith is simply a flip-side or an explanation of a lack of intent to defraud. What the government really has to prove here is an intent to defraud, and the good faith instruction is essentially an explanation to the jury to help them better understand what that means. So I think it would be useful to include the full definition of intent to defraud up front.

THE COURT: I am not going to do that. I think it gets further and further afield from answering their question. But I think it might make sense to add at the end of the first paragraph, "as I defined those terms for you yesterday," and that will make clear that it references back that there are definitions in the instruction.

MR. AVENATTI: No objection from the defense to that.

MR. PODOLSKY: Understood.

THE COURT: So I think we are settled on question two.

Lets talk about question one, and then we will go from there.

Mr. Avenatti, what is your authority that it would be error to send a copy of the transcript to the jury?

MR. AVENATTI: *United States v. Escotto*, E-S-C-O-T-T-O, Second Circuit case 1997, 121 F.3d 81, pincite 84-85, your Honor. It's not that it would be error to send the transcripts, your Honor. It is that there is a preference for readbacks; and also, when transcripts are provided, there are to be instructions that go along with them.

THE COURT: What are those instructions?

MR. AVENATTI: The court notes in the decision, your Honor, that other courts have found that allowing the jury to have unsupervised access to written transcripts poses an enhanced danger that jurors may unduly emphasize discrete sections of the trial testimony. And the court further notes that -- one moment, I'm sorry.

The decision notes that when a court permits readbacks or sends transcripts, appropriate cautions should be given to the jury to minimize the particular risks associated with either technique. For example, a jury instruction reminding the jury to consider all the evidence, without unduly emphasizing any portion of it, would be appropriate in most cases where the court sends transcripts into the jury room. In the event the Court does so in this instance over our objection, we would ask for that instruction.

THE COURT: Well, give me a moment to read *Escotto*.

MR. AVENATTI: I would finally note, in that decision, the court noted that some explanation would have been helpful as to why the court had decided to supply transcripts rather than permit a readback. The court also noted that when a trial court decides to provide written transcripts, a cautionary instruction is advisable, and further noted that doing so appeared to run counter to the jury instructions that had been given to the jury. Off the top of my head, I don't recall in the jury instructions in this case whether your Honor had informed the jury that they could request transcripts or a readback. I just don't recall.

THE COURT: I said readback.

Give me a moment. My initial reaction is that *Escotto* confirms that it's within my discretion to submit a transcript, and my reason is that it would be a massive waste of everybody's time to sit here and read a full day's testimony to the jury, not the least a waste of their time. So let me review this. I am certainly open to giving appropriate instructions with any transcript, but let me read this.

All right. So, first, I have now read the relevant portions of *Escotto*, and as I said, it confirms that it is well within my discretion to send copies of the transcript. Indeed, emphasizes two things that I think are of particular note here. One is that the judge should generally honor the jury's request. As I noted, the request here is explicitly for the

transcript, not for a readback, notwithstanding the language of my instructions yesterday. And, number two, the Second Circuit agreed with Judge Trager that a transcript in that case was far more efficient than providing a readback. Both of those principles support my decision here.

That said, I am prepared to give a cautionary instruction as *Escotto* recommends. That makes sense. Here is what I would propose. I would propose that we bring them up now, that I provide the answer to the good faith instruction, but also tell them the following with respect to their first request: We are working on getting you copies of the full transcript of Ms. Daniels' testimony. When it is ready, we will send 12 copies of the relevant portion of the transcript to you in the jury room. That said, let me remind you that you should consider all the evidence in the case without unduly emphasizing any portion of it. That is almost verbatim from *Escotto*.

Any objection from the government?

MR. PODOLSKY: Not to that, your Honor. I have one other thing to raise when we are done with this.

THE COURT: Mr. Avenatti.

MR. AVENATTI: One moment, your Honor.

Just to clarify for the record, I object to the transcripts going to the jury. But seeing that that has been overruled, I do not object to the further instruction as

proposed by your Honor.

THE COURT: I would also add the line "and please be patient with us" so that they don't get annoyed if it takes us longer than they would like or think it should.

Yes, Mr. Podolsky.

MR. PODOLSKY: Just one more, back on the good faith instruction. I was rereading it. If we take out the middle line that I think your Honor concluded, it essentially doesn't define good faith at all. So here is my proposal. It's only a maybe two- or three-word difference.

On line 7 it says, "Because an essential element of wire fraud is the intent to defraud --"

THE COURT: Slow down.

MR. PODOLSKY: I am just reading the same sentence.

THE COURT: I know, but the court reporter doesn't know what you're reading.

MR. PODOLSKY: Let me then just go to the sentence that I am really pointing to.

On line 10, which would be the next sentence, it says, as written, "Thus, if the defendant in good faith believed." So it just assumes an understanding of good faith. We could take the definition from *Alkins* above and simply change it to, "Thus, if the defendant held an honest belief that he was entitled to take the money," and so on. And that way we have at least not provided any further definition of good faith.

MR. AVENATTI: Your Honor, I object. We have already plowed this ground. The instruction should be exactly as what I have requested and what your Honor has proposed, which is to reread the good faith instruction as previously provided to the jury. If they want further information they will ask for it.

THE COURT: All right. I am going to adopt the suggestion. I think at least it nods in the direction of giving them an answer to their actual question as opposed to simply reading what they already have; and, given *Alkins*, there is no question that's a proper instruction and doesn't pose the problems that I alluded to earlier.

MR. AVENATTI: Just so I understand, because I don't understand, what exactly are you proposing to read now?

THE COURT: So you're objecting notwithstanding that you don't understand what you're objecting to.

MR. AVENATTI: No, your Honor. I am objecting because we arrived at a solution that I thought was appropriate and applicable under the law. That's why I am objecting.

THE COURT: I have got it. What I am planning to instruct the jury is the sentence that begins "thus." It would read, "Thus, if the defendant held an honest belief that he was entitled to take the money or property from the victim," and continue from there.

MR. AVENATTI: Your Honor, I object to that because I don't believe it's consistent with *Rossomando*. And I object as

it relates to honest belief.

THE COURT: Well, I think the law is pretty clear that honest belief is a fair definition. I don't think it's inconsistent with *Rossomando*. So I will make that change and overrule the objection.

Where do we stand on the transcript?

MR. ROHRBACH: Both parties have reviewed the transcript, and we have made a few changes. So we are now circulating a final version to the defense for final review and then we will have a version ready.

THE COURT: Let's do the following. I have a 3:30 sentencing in this room. So time is a little bit of the essence. We are going to get the jury. I will give them these two answers, which will tell them that we are working on the transcript, and in the meantime you should try to reach agreement on it. If you reach agreement on it, you don't need to come back to me, you can make 12 copies, give it to my staff and we will deliver it to the jury. If there is any disagreement, you should let me know and we will take it up as soon as the sentencing proceeding is done.

Yes.

MR. PODOLSKY: Will you give them a written version of the supplemental definition of good faith?

THE COURT: I wasn't planning to.

MR. PODOLSKY: It might make it easier for them rather

than hear it once, but we obviously defer to the discretion of the Court.

THE COURT: Mr. Avenatti, do you have a view?

MR. AVENATTI: Yes, your Honor. I object.

THE COURT: I will just stick with the oral answer, and if they want a written answer I am sure they will ask.

I will mark this note, which, by the way, was signed and dated today at 2:10 p.m., Court Exhibit 2, and as noted, will docket it at the conclusion of the case.

Can I go on the record briefly. I am also going to discuss with the jury the schedule, which is to say at 5:00, as with yesterday, they can leave if they have not reached a verdict; they don't need to come back to the courtroom. If we are not done with making copies by then, I will advise them that we will make them available first thing in the morning, and that they should resume their deliberations tomorrow, same cautionary instructions on that score.

Tomorrow I am going to tell them that if they have not reached a verdict, that we will stop at 4. That I will bring them up here at 4, a couple of minutes before 4, because I can't stay past that. So I just want to give you a heads-up about that.

(Jury present; time noted: 3:21 p.m.)

THE COURT: You may be seated.

Good afternoon, ladies and gentlemen. Welcome back.

We are in receipt of your second note, which I will take each question in turn.

First, we are requesting the full transcript of the full testimony of Stormy Daniels (Stephanie Clifford) that began on Thursday, January 27, continued on Friday, January 28.

We are working on getting you copies of the full transcript of Ms. Daniels' testimony. When it is ready -- and please be patient with us, it does take some time to prepare -- we will send 12 copies of the relevant portion of the transcript to you in the jury room. That said, let me remind you that you should consider all the evidence in the case without unduly emphasizing any portion of it.

With respect to your second question, which asks, "Please define good faith as mentioned in the judge's instructions," as I instructed you yesterday, the second element that the government must establish beyond a reasonable doubt before you can find the defendant guilty of wire fraud, the offense charged in Count One, is that the defendant devised or participated in the fraudulent scheme knowingly, willfully, and with specific intent to defraud, as I defined those terms for you yesterday.

Because an essential element of wire fraud is the intent to defraud, it follows that good faith on the part of a defendant is a complete defense to the charge of wire fraud. Thus, if the defendant held an honest belief that he was

entitled to take the money or property from the victim, even if that belief was mistaken, then you must find him not guilty even if others were injured by the defendant's conduct.

The defendant has no burden to establish good faith. The burden is on the government to prove fraudulent intent and the consequent lack of good faith beyond a reasonable doubt.

If that does not answer your question adequately, you can, of course, send us another request.

With that, let me give you some instructions, just logistical and timing instructions.

First, in a moment I will excuse you to continue your deliberations. You should continue until 5:00, as you did yesterday, but when 5:00 comes, if you have not reached a verdict, you are free to go and don't need to return to the courtroom, in fact, will not return to the courtroom. In that event, you should be back in the jury room tomorrow morning same time, same place -- that is to say, no later than 8:45, certainly no later than 9:00, so you can start your deliberations at that time.

I want to remind you that you cannot continue your deliberations unless all 12 of you are present. So if anyone is late or missing, and I know it's raining today and I know there is other weather forecasts for tomorrow, if anyone is late, you cannot continue your deliberations until all 12 of you are present. So please make your best efforts to be here

on time so that you can continue your deliberations if you have not reached a verdict today.

Looking forward to tomorrow, again, you should just go directly to the jury room. I won't bring you here in the morning. If you have not reached a verdict, then tomorrow we will end up stopping at 4 p.m. I just want to give you a heads-up about that. Obviously, if you have any notes or reached a verdict before that time, you should let us know.

With that, I will excuse you to continue your deliberations. We will send the portions of the transcript that you have requested to you when it is ready for you, and with that you are excused. Thank you.

(Jury resumes deliberations)

THE COURT: You may be seated.

Anything else from the government?

MR. PODOLSKY: No, your Honor.

THE COURT: Mr. Avenatti.

MR. AVENATTI: No, your Honor.

THE COURT: So please try to reach agreement as quickly as possible on the transcript. If there is agreement, the government should make 12 copies as quickly as possible. For the sake of the environment, I would say double-sided. Get them to us, and we will get them to the jury. I would love for that to all happen before the end of the day so that they have it in the jury room before they leave today. If there is any

disagreement over portions to be redacted, you can let my staff know, and as soon as the sentencing is over I will take that up. I will leave the bench in a moment. When I do, please vacate counsel table so that the parties in the sentencing can assume their places.

I will see you when I see you. Thank you.

(Recess pending verdict)

THE COURT: First and foremost, where do the transcripts stand?

MR. PODOLSKY: They are being printed right now, your Honor, and then brought up.

THE COURT: So hopefully -- well, the jury is not going to get them today, so we will provide them first thing tomorrow when they are all here, but please get them to my staff as soon as they are ready.

The government e-mailed a case to me, *United States v. Gole*, G-O-L-E, 158 F.3d 166 (2d Cir. 1998), and requested to be heard. I have read the case, and I don't really know what to say. It kind of distinguishes *Rossomando* into oblivion in some respects and seems to stand for the proposition that Mr. Avenatti's defense in this trial is no defense at all. Having said that, I am inclined to say it's too little too late -- or not too little, but it's too late. It is certainly not too little, and it would have been rather significant had this been brought to my attention earlier, but I just don't know what you

want me to do at this point.

MR. PODOLSKY: Let me try to articulate how we see this.

At the charge conference, we made the distinction between entitlement to money and entitlement to take money, which is how the charge was written and given to the jury. But the jury has evident confusion about the meaning of that good faith instruction. We think it would be a defense under *Gole* and under the law of this circuit, and as we understood the defendant's arguments, if he had an honest good faith belief that he was authorized to take the money, and therefore the representations made in order to obtain it were true. We don't think it is a defense, and we don't think it's a defense under your current instructions, if he lied to get the money, the wire instructions were false, he wasn't authorized, but he thought he was ultimately entitled to the money. We think that's the distinction that was made, or at least attempted to be made to the jury in the instructions, and we think the jury should be entitled to a clearer articulation of that distinction so that they don't have the misimpression that it is a defense to take money under false pretenses simply because you think that ultimately that money is yours.

THE COURT: Clarification and then reaction.

One, your view is that my instructions are consistent with this decision and just should clarify that entitlement to

the money is distinct from entitlement to take the money; that to establish good faith, it has to be good faith to take it, which is definitely the issue that I focused on the other day.

MR. PODOLSKY: Correct. And just to put a gloss on that, your Honor, that the representations made in furtherance of obtaining the money, you have to believe them to be true. Which I don't say that to disagree with what your Honor said, I am just providing a further explanation.

THE COURT: That may be right, and maybe if the jury -- this is, I guess, the reaction portion of my commentary. Maybe if the jury comes back and says, please give us further instructions on what good faith means, then it might make sense to be clearer on that point. But I guess my reaction is that you had an opportunity to bring this case to my attention before the charge conference, and you didn't. You had an opportunity to bring it to my attention before we responded to the jury's note, and you didn't. I recognize these things are fast-paced, and I am sure it's just that it came to your attention after we responded, but there is no note pending and it would certainly be unorthodox, if not error, for me to basically seek to clarify when the jury has not asked for any further clarification.

So I guess my reaction is, while it may not be too little, it's certainly too late, and if the jury asks another question to which this is responsive, then we can consider at

that time whether an instruction that makes the point clearer is appropriate.

MR. PODOLSKY: Your Honor, I am certainly happy to look tonight. I don't think it would be error. In fact, I think it would be appropriate to clarify an instruction that was obviously done in the moment in an attempt to respond quickly to the jury's question that we think could provide a misleading picture of the law to a jury that is requesting assistance on it. In effort to bring this issue to your Honor's attention, we haven't researched in what circumstances a corrective or additional instruction responsive to a prior note might be appropriate, and we are happy to do that this evening, but we did want to bring this to your Honor's attention because we are concerned, given the jury's note, that they are confused about the distinction that the cases make here. I think that's the point I want to make.

THE COURT: I guess two further comments, and then Mr. Avenatti, if you wish to be heard, you can, but I am not sure it will be necessary.

Number one, I am not sure that the instruction that I gave them is inconsistent with this, in a sense that it says, if the defendant held an honest belief that he was entitled to take the money or property from the victim, etc. etc. And again, that's the sort of critical distinction that we have fixed on. It's not, in my view, sufficient to establish a

defense in good faith to say that he believed he was entitled to that money. If he had brought it to a court or an arbitrator and filed a quantum meruit claim or a contract claim or any kind of claim, as the circuit says in *Gole*, they want to encourage that form of resolution and not lying to get something that you think you are otherwise entitled to. But I think the instruction is accurate in that regard and focusing on the taking as the central question. That's number one.

Number two, as I have said to Mr. Avenatti, if you can provide me with authority that it is appropriate to clarify when there is no pending question, and you had an opportunity to bring this up not only at the charge conference, but also at the conference we held earlier today in contemplating a response to the second note, I am happy to consider it. But my current inclination is that without a note pending, having answered the jury's question and having given you an opportunity to be heard in providing that answer, that it's just too late absent another note.

MR. PODOLSKY: Understood, your Honor. Since the jury has gone home for the day, I will take your sort of half invitation as, if we find authority that we think supports the request, we will put it in tonight. Obviously, if we don't, we can take up the issue if the jury has another note that implicates these matters. So we will work on it tonight. If there is something that we think warrants additional discussion

with the jury in the morning, we will let you know.

THE COURT: I would also encourage you, if you think a more pointed instruction is appropriate in light of *Gole*, maybe take a stab at drafting one. And I can't imagine that Mr. Avenatti is going to agree, but certainly if you show it to him in anticipation of our discussing it, whether because you come up with authority that suggests I should do that without another note or because we end up getting another note. But the bottom line is you may as well be prepared and arm yourselves for whatever may happen.

To that end, I have no idea if the jury will request any additional testimony, but I wonder if you all should undergo, if you haven't already, the exercise of redacting other witnesses' testimony. I will leave it to you to discuss. It seems to me that there are some witnesses in this case who the jury would be more likely to request than others, that is, more critical fact or percipient witnesses rather than summary chart witnesses or the sort of custodial witnesses, and it might make sense to just anticipatorily agree on redactions to those, so that if they make a request we can honor it more quickly than we were able to this afternoon.

MR. PODOLSKY: We actually had undertaken those efforts. The defendant, without getting into the nitty-gritty, he wanted additional things redacted, overruled objections. So that's what took the additional time. So we can continue to

work on that.

THE COURT: I am just suggesting that you do that with respect to some of the other witnesses, Mr. Macias, perhaps, or Ms. Regnier.

MR. PODOLSKY: Absolutely.

THE COURT: Mr. Avenatti, I am not sure that leaves anything for you to address, but do you wish to be heard?

MR. AVENATTI: Briefly, your Honor.

For the record, I do object to any further supplemental instruction to the jury for the reasons that your Honor has stated, as well as others, which I will reserve the right to comment on in the event the jury asks for further instruction. Beyond that, your Honor, I am going to refrain from snatching victory from the jaws of defeat, or, I should say, snatching defeat from the jaws of victory.

THE COURT: I think you got it backwards, but regardless, it is wise to quit while you're ahead, a different way of putting it.

Very good. Anything else either side needs to raise?

Government.

MR. PODOLSKY: No, your Honor. We will respond in writing as appropriate.

THE COURT: Only if there is something else you wish to say or you think there is authority that I should consider. And again, if you draft something, I would urge you to run it

by the defense, not because I expect that they will agree, but at least so that they have an opportunity to review it and propose any edits if they think that's appropriate.

Yes, Mr. Avenatti.

MR. AVENATTI: There is one other point that I have wanted to make. I think this is self-evident, but I am going to make it for the benefit of the record.

Following the instruction that your Honor gave when the jury returned to the courtroom, following that instruction, the jury, from what I understand, returned to the deliberation room and continued deliberating until approximately 5:00, to the best of our knowledge. So I just want the record to be clear that the jury was not in a holding pattern unable to deliberate pending receipt of the transcript.

THE COURT: I think that was self-evident, but now duly noted.

I expect, again, like this morning, that you will be nearby tomorrow, if not in the courtroom, certainly easily accessible in the event that we get additional communications from the jury.

I think my law clerk will wait here for the copies. Is that what she should do, Mr. Podolsky?

MR. PODOLSKY: Yes. That would work, your Honor.

THE COURT: Please try to get them to her as quickly as possible. Otherwise, have a good evening, and I will see

you at some point tomorrow. Thank you.

(Adjourned to February 4, 2022, at 9:00 a.m.)